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CHARLES ELMORE GRIFFLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1213

ANNIE MOORE, as administratrix of the goods, chattels and
credits of William J. Simpson, deceased,

Petitioner,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Opinions Below.

The opinion of the District Court is set forth in the record at pages 29 to 31, inclusive, and is not officially reported.

The opinion of the Circuit Court of Appeals, dated February 21, 1946, is reported in 153 F. (2d) 782, and is also set forth at pages 34 and 35 of the record.

Statement.

On page 3 of his statement, petitioner's counsel in the third paragraph states that "the defendant" claimed under the North Carolina statutes, etc. This obviously is a

typographical error as the contention set forth in that paragraph was advanced by the "plaintiff" in the court below. Otherwise the petitioner's statement of facts appears to be correct.

Argument.

It is the contention of the respondent that the Petition for a writ of Certiorari should be denied, for the following reasons:

(1) That both the District Court and the Circuit Court of Appeals correctly construed the provisions of the applicable North Carolina statute under which the petitioner claimed to be entitled to relief, in the light of the decisions of the Supreme Court of the State of North Carolina construing that statute.

(2) That the New York courts and the Federal courts sitting in New York are bound by the interpretation placed upon the foreign statute by the court of last resort of the foreign state.

(3) That Sections 13 and 55 of the Civil Practice Act of the State of New York are merely general statutes of limitation and have no application to statutory causes of action like the one created by the North Carolina Death Act here under consideration.

The reasons advanced by the petitioner for requesting the granting of a writ of certiorari are all based upon a misconception of the decisions cited as being applicable and an erroneous construction of the New York statutes cited as sustaining petitioner's contention.

POINT 1.

The North Carolina Supreme Court has uniformly construed the time limitation of the death statute here under consideration as a condition annexed to the cause and not as a mere statute of limitation.

The petitioner's complaint predicates her right to recover upon the law and statutes of North Carolina granting a cause of action for wrongful death, it appearing that the death of her intestate occurred in the State of North Carolina while he was a passenger on the train of the respondent (R. 4-6).

The full text of the applicable statute is as follows:

“§28-173. DEATH BY WRONGFUL ACT; RECOVERY NOT ASSETS; DYING DECLARATIONS.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like

manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence."

The Supreme Court of North Carolina, the court of last resort of that State, has uniformly held that the requirement in the statute that action shall be brought within one year after such death is a condition annexed to the cause of action and is not a statute of limitations which must be pleaded by the defendant.

Taylor v. Cranberry Iron etc. Co., 94 N. C. 525 (1886);
Gulledge v. Seaboard Air Line Ry Co., 147 N. C. 234 (1908);
Bennett v. North Carolina Railroad Company, 159 N. C. 345 (1912);
Hatch v. Alamance Railway Co., 183 N. C. 617 (1922);
Hanie v. Penland, 193 N. C. 800 (1927);
Neeley v. Minus, 196 N. C. 345 (1928);
Mathis v. Camp Manufacturing Co., 204 N. C. 434 (1933).

These decisions establish conclusively that the one year time limitation contained in the North Carolina statutes is made a condition of the right and that it shall expire after the period of limitation has elapsed. In the case at bar the death of petitioner's intestate occurred on December 16, 1943 (R. 18), and the one year period from the date of death expired on December 16, 1944, at which time the right of action granted by the North Carolina statutes was extinguished. At the time petitioner commenced her suit on December 23, 1944, no right of action under the North Carolina Death Statute existed and her complaint did not state a cause of action upon which relief could be granted and it was properly dismissed on defendant's motion.

POINT II.

In construing a statutory cause of action created by the law of a foreign state the Courts of New York have followed the decisions of the highest court of the foreign state interpreting such statute.

On several occasions the New York Court of Appeals has been called upon to interpret the statutes of sister states on suits brought to enforce causes of actions granted by statutes of these states. In each instance the New York Court of Appeals has followed the interpretation of the statutes of other states which have been made by the highest courts of the states enacting them.

In case of *Schwertfeger v. Scandinavian-American Line*, 186, App. Div. 89 (Affirmed 226 N. Y. 696 on the opinion of Shearn, J. below), the Appellate Division of the Supreme Court, State of New York, reversed the judgment of the lower court and held that an action instituted by plaintiff to recover damages for the death of her intestate by the negligence of defendant under the provisions of a New Jersey statute should have been dismissed where it appeared the action was instituted more than two years after death, and the period of limitation in the New Jersey death statute is two years (2 Comp. Stat. p. 1908, §8, as amended by P. L. 1913 p. 586). In arriving at this conclusion, the Appellate Division stated that it was bound by the interpretation placed upon the foreign statute by the highest court in the foreign state. In so holding, the Court at page 90 of its opinion stated:

“It is, of course, conceded that no cause of action existed under the common law and that the sole right to maintain an action to recover damages for

the death of the intestate caused by the negligence of the defendant was created by and depends upon the provisions of the statute of New Jersey, where the accident occurred. (*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 319; *Gurofsky v. Lehigh Valley R. R. Co.*, 121 App. Div. 126, 128; *affd.*, 197 N. Y. 517.) In this State it is now held that the time prescribed by statute within which the action to recover damages for death caused by wrongful act may be commenced is not of the essence of the right to maintain the suit, but is subject to a statute of limitations. (*Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 101.) In the State of New Jersey, however, it is the settled law that the two-year period within which an action is required to be brought under the New Jersey Death Act is not a period of limitation, but is an integral part of the remedy and a condition precedent to the maintenance of an action under that statute. (*Eldridge v. Philadelphia & Reading R.R. Co.*, 83 N. J. L. 463; *Lapsley v. Public Service Corporation*, 75 *id.* 266.) This court is bound by the interpretation placed upon the foreign statute by the highest court in the foreign State. (*Jessup v. Carnegie*, 80 N. Y. 441, 455.) Section 405 of the Code of Civil Procedure in no way aids the plaintiff. In holding to the contrary, and relying upon the case of *Gaines v. City of New York* (215 N. Y. 533), the learned justice at Special Term overlooked the distinction between a condition precedent and a statute of limitations. It was a statute of limitations that was involved in the *Gaines* case. Furthermore, it is contrary to the principles of law established in this country that the Legislature of one State may in any way enlarge a right conferred by the statute of another State."

It will thus be seen, although the Court had clearly in mind the fact that in the case of *Sharrow v. Inland Lines*,

Ltd., 214 N. Y. 101 it had been held that the time limitation in an action under the New York Statute to recover damages for death caused by wrongful act was a statute of limitation, none the less, in construing the time limitation in the New Jersey Act, it considered itself bound by the interpretation placed upon that statute by the highest Court of the State of New Jersey.

Also in the case of *Gatti Paper Stock Corporation v. Erie Railroad Company*, 247 App. Div. 45 (affirmed without opinion, 272 N. Y. 535), the Court held that the time limitation in the statute there under consideration (New Jersey Railroad Act) Section 58, (3 Comp. Stat. p. 4246) was a condition precedent to the right to maintain the action. That at the termination of that time, the liability expires, leaving nothing thereafter on which to predicate an action. At page 47 of its opinion, the Court said:

“Where a liability is created by a statute, and the same statute that creates the liability limits the right of action thereon to a stated period of time, the effect is that at the termination of that time the liability expires, leaving nothing thereafter on which to predicate an action. In the case of *Fairclough v. Southern Pacific Co.* (171 App. Div. 496; *affd.*, 219 N. Y. 657) this court recognized and stated the foregoing proposition and held that compliance with the time requirement of the statute is a condition precedent that is applicable in whatever jurisdiction an action predicated on the statute may be commenced, as distinguished from the merely procedural nature of a true Statute of Limitations which is applicable only in the jurisdiction of its origin.”

Both of these actions were instituted by plaintiffs who were residents of New York and were both decided long after the Court of Appeals had handed down its decision

in *Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 201, the case upon which petitioner's counsel places so much reliance in his attempt to sustain his contention that the Court of Appeals would have applied the New York Statute of Limitations in the case at bar.

The facts in the case at bar bring it squarely within the rule announced in Section 605 of the Restatement of Conflict of Laws, which reads as follows:

“§605. TIME LIMITATION ON CAUSES OF ACTION.

If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.”

POINT III.

Petitioner has misconstrued the ruling of the North Carolina Supreme Court in the case of *Tieffenbrun v. Flannery*, 198 N. C. 397.

Petitioner's counsel attempts to spell out of the ruling of the North Carolina Supreme Court in the case of *Tieffenbrun v. Flannery*, 198 N. C. 397, a hard and fast rule that the limitation in actions for wrongful death occurring outside of the State of North Carolina are to be considered as mere statutes of limitation and in such cases will apply North Carolina statutory limitation as the law of the forum.

The *Tieffenbrun* case was brought by a resident of the State of Missouri against the defendant, a resident of North Carolina, to recover for the death of her intestate which occurred in the State of Florida. The suit to recover thereon was brought more than one year after the death

occurred and less than two years thereafter. As appears from the statement of the case, pages 397-398, in which the judgment rendered in the lower court is quoted, both counsel agreed and admitted in open Court that the statutory laws of Florida, as set forth in the complaint, were correct and that the statute of limitations of the State of Florida applicable to actions for wrongful death is not contained in the statute creating such right of action and that it is not a condition of such action, but is a general statute of limitations contained in a separate statute, to wit, in the Revised General Statutes of Florida for 1920, §2939, subsection 6, which reads as follows:

“Within two years.—An action by another than the State upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery or false imprisonment; an action arising upon, or account of an act causing a wrongful death.”

We have, therefore, a concession made in open Court by both parties that the time limited by the Florida statute for the institution of suits to recover for wrongful death was a mere general statute of limitations. Under these circumstances there was no alternative left to the North Carolina Supreme Court but to apply the law of the forum, which provided that actions for wrongful death shall be commenced within one year. The Court in its opinion, at page 402, clearly stated the only question of law it decided or intended to decide in the following language:

“The determinative question, then, is whether the time limit of C. S., 160, constitutes a statute of limitation *as well as* a condition annexed to liability.” (italics supplied).

Petitioner's counsel proceeds on the erroneous theory that the North Carolina Supreme Court in the *Tieffenbrun*

case should have construed the two year time limitation of the Florida statute as a condition annexed to the cause of action, and in refusing to do so violated proper rules of comity.

Clearly there was no basis for the North Carolina Court to construe the time limitation in the Florida statute as other than a general statute of limitations. As is set forth in §605 of the Restatement of Conflict of Laws in the comment under that section:

“A general statute of limitations is not construed as conditioning rights.”

Reference is also made in petitioner's brief to the headnotes appearing in the report of the *Tieffenbrun* case at 68 A. L. R. 210 to sustain petitioner's contention. All that the Court determined was that the North Carolina wrongful Death Statute constituted a Statute of Limitations as well as a condition annexed to the liability.

The two other cases cited by the petitioner's counsel as sustaining this contention, namely, *Theroux v. Northern Pacific R. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; and *Keep v. National Tube Company*, 154 Fed. 121, are distinguishable. In each instance the Court found that the limitation contained in the statute pursuant to which suit was instituted in the foreign jurisdiction was a condition annexed to the cause of action and not a mere limitation of time within which the remedy might be prosecuted.

There is nothing inconsistent in the holding of the North Carolina Supreme Court in the case of *Tieffenbrun v. Flannery*, *supra*, with its repeated rulings set forth in Point I of this brief, that the time limitation in the North Carolina Death Statute is a condition annexed to the cause, which must be alleged and proved by the plaintiff in order to make out a cause of action.

POINT IV.

The applicable authorities indicate the courts of New York would have construed the time limitation in the North Carolina statute as the District Court and the Circuit Court of Appeals have done.

Petitioner's counsel in Point III of his brief attempts to show that if the motion to dismiss in the case at bar had been made in the New York Supreme Court, that Court, following the public policy of the State, would have construed the time limitation in the North Carolina statute as a mere statute of limitation and denied the motion to dismiss. As authority he cites the case of *Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 101, Sections 13 and 55 of the New York Civil Practice Act.

The *Sharrow* case simply decided that the time prescribed by the New York statute (Decedent Estate Law, Section 130) within which an action to recover damages for death caused by wrongful act may be commenced, is a statute of limitation.

However, as has been held by the New York Courts on numerous occasions, Section 130 of the Decedent Estate Law, though general in terms, creates a right of action only for wrongful death occurring in the State of New York and has no application to an action for wrongful death granted by a statute of another State. See *Baldwin v. Powell*, 294 N. Y. 130; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465.

That the time limitation contained in Section 130 of the Decedent Estate Law has no application to an action for wrongful death brought under the statute of another State was clearly indicated by the Court of Appeals in its subsequent decision in the case of *Schwertfeger v. Scandina-*

vian American Line, 186 App. Div. 89; Aff'd 226 N. Y. 696. In that case, in construing the time limitation of the New Jersey Death Statute, it followed the law as laid down by the highest Court of the State of New Jersey rather than the rule announced in the *Sharrow* case.

There is also an attempt on the part of petitioner's counsel to find some support for his contention in Sections 13 and 55 of the New York Civil Practice Act, as Amended, by Chapter 516 of the Laws of 1943. These sections are set forth in full in the appendix to petitioner's brief, pages 9 and 10. Also at page 23 of the Record.

Prior to the amendment in 1943, Section 13 of the Civil Practice Act read as follows:

"§13. Limitation in action arising outside of the state. Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws of a state or country where the cause of action arose, for bringing an action upon such cause of action, except where the cause of action originally accrued in favor of a resident of this state."

The report of the Law Revision Commission which recommended the amendment of this section, Legislative Document (1943) No. 65 F, states in reference to Section 13 of the Civil Practice Act at pages 8 and 9, as follows:

"This provision was originally enacted in 1902. Its generally recognized purpose is to prevent the bringing of actions in New York upon causes of action that arose in another jurisdiction when the remedy in such jurisdiction is barred by a limitation period shorter than that obtaining in New York. An exception is made where the person to whom the cause of action originally accrued was a resident of

New York at the time. As to actions by non-residents coming into the state to sue, or assigning their claims to New York residents, the section makes applicable the limitation period of the place where the cause of action arose whenever that period is shorter than the corresponding New York period.

"Like section 55 of the Civil Practice Act, section 13 does not state whether the foreign period of limitation controls when it is longer than the New York period. However, it is settled that section 13 does not apply so as to allow a longer period for bringing action when the foreign period exceeds the New York period. *Meyers v. Credit Lyonnais*, 259 N. Y. 399 (1932).

"The Commission believes that the rule stated in section 13 is sound in policy, and proposes no change. It recommends, however, that the section be amended to state affirmatively the existing rule, that where the foreign period of limitation is *longer* than that provided by the New York law, the New York law controls."

Section 55 of the Civil Practice Act prior to its repeal in 1943 read as follows:

"§ 55. Action against nonresident. Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representatives after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

In recommending enactment of a new Section 55 the Commission stated at page 8 of its report, as follows:

“The first part of this provision was originally enacted in 1877, and in its original form made an exception in favor of claimants resident in New York. This exception was deleted in 1916, and the proviso now appearing in the statute was added.

“Section 55 does not state whether the foreign period of limitation controls when it is longer than the New York period. It is settled by decision, however, that it does not control, and that the New York period of limitation applies. *Kirsch v. Lubin*, 131 Misc. 700 (1927), aff’d, 223 App. Div. 828, aff’d, 248 N. Y. 645. But under the proviso added to section 55 in 1916, the New York period also controls if the period limited by the laws of defendant’s residence is less than the term fixed by the New York law. The net result of section 55 as thus construed is that the period of limitation prescribed by the law of the place where defendant resided at the time the cause of action accrued, controls the commencement of an action in New York, only where such period coincides with that provided by New York law. The proviso nullifies completely the original enactment, and the section has no practical effect.

“The Commission recommends that section 55 be rewritten to state the existing law.”

If anything more were needed to show that these two sections of the Civil Practice Act are general statutes of limitation which have no application to a statutory cause of action such as the one asserted by the plaintiff in the case at bar, it is provided at page 30 of Legislative Document (1943) No. 65F compiled by the Law Revision Commission which recommended the proposed changes in these two sections of the Civil Practice Act where the following appears:

“* * * Section 605 of the Restatement does not conflict with Section 13 of the Civil Practice Act.”

Also

“Section 605 of the Restatement which bars an action based on a right created by the law of the state where the cause of action arose, and becomes extinct after the expiration of a certain time, is generally recognized as sound.”

Throughout the entire study submitted by the Law Revision Commission in its recommendation to the Legislature concerning the proposed amendments to Sections 13 and 55 of the Civil Practice Act there is not a single reference indicating that the provisions of these two sections have any application to a cause of action for wrongful death instituted under the provision of the Death Statute of a foreign State which contains a time limitation which has been construed by the highest Court of the State enacting the statute to be a condition annexed to the right. The study does, however, cite in the footnote at page 30 the comment and illustration contained in Section 605 of the Restatement of Conflict of Laws as follows:

“COMMENT:

“a. This provision is not infrequent in the case of statutory wrongs and particularly in the case of the statutory action for wrongful death (see sec. 397, Comment b). The limitation need not be contained in the statute creating the right, but may be found in any statute specially directed at a qualification of the right. A general statute of limitations is not construed as conditioning rights.

"ILLUSTRATION :

"1. By a statute of X, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within one year from the time of the death. By a statute of Y, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within two years from the time of the death. A is killed in state X by the negligence of B. Sixteen months later, C, A's next of kin, brings an action in state Y against B for negligently causing A's death. The action cannot be maintained."

POINT V.**Conclusion.**

The petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit should be denied.

All of which is respectfully submitted.

May 28, 1946.

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